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No. _____

In the Supreme Court of the United States

October Term, 1986

AARON MAGIDOW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

(Ninth Circuit Court of Appeals No. 83-5229)

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QUESTIONS PRESENTED

1. What is the necessary showing of "unavailability" of a witness where the witness claims the privilege against self-incrimination under oath and through his attorney, and where the district court finds in an *in camera* hearing that the witness' proposed testimony is relevant and favorable to the defense?

2. Where the court finds the prosecutor has improperly dissuaded a defense witness from testifying to facts which are relevant and favorable to the defense, may the court permit the jury to reconsider whether the prosecutor acted improperly at all?

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INTRODUCTION

> "It is emphatically the province and duty of the judicial department to say what the law is. . . ." (*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) (per Marshall, C. J.).)

The present petition is necessary because both the trial court and the Court of Appeals failed to heed Chief Justice Marshall's admonition, after the district court

found a defense witness had been improperly coerced by the lead prosecutor into invoking his right against self-incrimination. The district court made the latter finding in a hearing conducted out of the jury's presence. The court also found, after an *in camera* hearing, that the witness' testimony would have been relevant and favorable to the defense. Yet, that court refused (a) to impose sanctions on the prosecution, or (b) to instruct the jury that the prosecutor had acted improperly in denying the defense the benefit of the witness' testimony. Instead, the court permitted the jury to decide that the prosecutor's conduct was proper and to reach a verdict without knowing what the coerced witness would have testified to. The jury then convicted petitioner on several counts and reached no verdict on several others.

On appeal, the Court of Appeals for the Ninth Circuit refused to consider the witness-coercion issue, explaining that the defense had not properly shown the witness was "unavailable" because he "was not placed on the stand so that he would be required to assert the privilege as to individual, specific questions." (See App. A, p. A9.) However, without objection from the prosecution or from the trial court, both the witness and the witness' attorney indicated on the record that the witness would invoke his Fifth Amendment rights if asked any questions about the case. Indeed, the witness so stated under oath. Thus, the Court of Appeals' ruling ignored the latter facts. More importantly, it (a) raises an important question of law under this Court's Rule 17.1(c) concerning the formal requirements for establishing a witness' unavailability and (b) creates a conflict under Rule 17.1(b) with decisions of other circuits.

QUESTIONS PRESENTED

Therefore, petitioner asks this Honorable Court to grant certiorari to review both important issues raised by the above circumstances, as follows:

1. What is the necessary showing of "unavailability" of a witness where the witness claims the privilege against self-incrimination under oath and through his attorney, and where the district court finds in an *in camera* hearing that the witness' proposed testimony is relevant and favorable to the defense?

2. Where the court finds the prosecutor has improperly dissuaded a defense witness from testifying to facts which are relevant and favorable to the defense, may the court permit the jury to reconsider whether the prosecutor acted improperly at all?

PARTIES TO THE PROCEEDING

Petitioner is Aaron Magidow, defendant and appellant below. Respondent is the United States of America, plaintiff and appellee below. (Petitioner was tried jointly with two codefendants, Alan Levy and Harold Hackel, whose appeals were separately docketed by the Court of Appeals. The three appeals were argued jointly and determined in a single opinion. (See App. A.))

OPINIONS BELOW

The district court's oral ruling concerning the witness-coercion issue was as follows:

> "I would indicate for the record that the court does find that *the conduct of the prosecutor was not appropriate in this case.*" (R.T. Vol. 28:4484, lines 18-20; emphasis added.)
>
> "The conversation between Mr. Bourbeau and Mrs. Stock relative to Mr. Berton

> testifying, the court previously indicated that I felt that *it was misconduct*, that *it was certainly improper*, that it was not necessary for Mrs. Stock to have phoned Mr. Bourbeau and had the conversation with him concerning his client testifying. But even if such a telephone call were made, that she should not have indicated that it wasn't in his client's best interest to testify and made reference to the pending state counts, based upon Mr. Bourbeau's testimony, at least in his mind, he viewed it as a threat and based thereon, concluded that it would not be in his client's best interest to testify and advised him to take the 5th.
>
> "The court listened to an offer of proof as to what Mr. Berton's testimony would be, if he had been called by the defense. Based upon the offer of proof, *the court would find that the evidence was relevant, that it was material, that it would have been favorable to the defense.*" (R.T. Vol. 31:5082, line 16 - 5083, line 8; emphasis added.)

The Court of Appeals' nonpublished opinion, filed February 4, 1986, is reproduced in Appendix A.

The Court of Appeals' order of April 25, 1986, denying a rehearing, is reproduced in Appendix B.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the February 4, 1986 opinion of the Court of Appeals and of that court's April 25, 1986 order denying a rehearing. This Honorable Court has jurisdiction pursuant to 28 U.S.C. section 1254, subd. (1).

FEDERAL CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THIS PROCEEDING

This proceeding involves the following federal constitutional provisions and rules:

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

United States Constitution, Amendment VI:

> "In all criminal proceedings, the accused shall enjoy the right . . . to have compulsary process for obtaining witnesses in his favor. . . ."

Federal Rules of Evidence, Rule 804(a):

> " 'Unavailability as a witness' includes situations in which the declarant-
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement . . ."

STATEMENT OF THE CASE

A. Procedural History.

On September 30, 1982, petitioner Magidow was indicted, along with Levy, Hackel, Plumeri and Berton, on a total of 44 counts involving alleged mail fraud (18 U.S.C. sec. 1341) and wire fraud (18 U.S.C. sec. 1343). Counts 1 through 10 and 12 through 18 (Count 11 was later deleted) alleged interstate phone calls in furtherance of the "Alacal" scheme from August through October, 1979. Counts 19 and 21 (Count 20 was later deleted) alleged interstate telephone calls in May, 1980

in furtherance of the "CBP" scheme. (Counts 22 through 31 pertained to a fourth alleged scheme involving Levy only. These counts were severed prior to trial and dismissed after the verdicts were returned.) Counts 32 through 44 (except Counts 40, 41 and 43 which were later deleted) alleged interstate telephone calls in furtherance of the "DCI" scheme from August, 1981 through March, 1982. Only Counts 1 and 6 pertaining to Alacal and Count 19 pertaining to CBP involved telephone calls in which Magidow was an alleged participant. (E.R. 1-25.)

A joint trial as to Levy, Hackel and petitioner commenced on March 8, 1983 and continued for 35 court days, including approximately 10 days of jury deliberations. (E.R. 54-87.) On May 9, 1983, the jury returned its verdicts. As to petitioner, the jury failed to reach a verdict on Counts 1 through 6, which included two of the three alleged telephone calls in which Magidow was a direct participant. The jury found Magidow guilty of the remaining counts against him, except for Count 44 as to which no verdict was sought. On the government's motion, the court dismissed Counts 1 through 6. (E.R. 87-90.)

On September 19, 1983, after petitioner's various post-trial motions had been denied, he was sentenced to two years imprisonment on Counts 7 to 10, 12 to 19, and 21, plus five years' probation on Counts 32 to 39 and 42. (E.R. 181-182.)

Petitioner filed a timely notice of appeal from the judgment. (E.R. 164.) Petitioner's appeal was heard by the Court of Appeals for the Ninth Circuit jointly with the appeals of codefendants Levy and Hackel. The Court of Appeals issued a single opinion on February 4, 1986 affirming the judgments against each. (App. A.)

Petitioner filed a timely petition for rehearing arguing, inter alia, that the Court of Appeals' opinion erred in refusing to consider the witness-coercion issue. The rehearing petition was denied on April 25, 1986. (App. B.)

B. Summary Of The Facts.

The prosecution presented evidence that Levy, Hackel, Plumeri and Berton participated in three companies (Alacal, CBP and DCI) through which they purchased quantities of meat much of which they never paid for. Each of the companies eventually became bankrupt. The scheme was profitable because the latter participants resold the meat to others, including petitioner Magidow who paid them promptly on each occasion. The government's theory was that petitioner was a knowing and necessary participant in the scheme. Petitioner's defense was that he had been in the meat business for many decades and was a tough experienced businessman who was able to make profitable purchases from Alacal, CBP and DCI by paying promptly and by taking advantage of the other defendants' inexperience in the industry.

Several prosecution witnesses described petitioner as a tough businessman who drove a hard bargain, but who could be relied upon to keep his end of the bargain and to pay promptly. For example, Mark Markell testified to those facts during the Alacal portion of the trial. (See for example, R.T. Vol. 8:562-563, Vol. 12:1186-1188, 1197.) Since petitioner's company had its own processing facilities, when a dealer wanted to sell meat to petitioner he had to do so at a price cheaper than petitioner's cost of making the meat for himself. (R.T. Vol. 12:1197.)

Pat Plumeri, the former defendant who testified as a government witness, stated that petitioner was one of the persons in the business who was known to buy distressed merchandise which could not be sold on the general market. Petitioner would pay by check on delivery. (R.T. Vol. 26:4129.)

Petitioner is president of his own company, Apex Meat. The company is primarily engaged in boning (processing) operations in which meat is brought in and broken down into cuts of meat that are then resold. (R.T. Vol. 14:1627-1628.) In addition, petitioner engaged in meat trading, both purchasing and selling. (R.T. Vol. 14:1628-1630.)

Apex employs 100 to 125 people and processes many types of beef products. In 1979, Apex had gross sales of about $37 million. (R.T. Vol. 15:1721, 1723-1724.) Apex's net profit percentage averaged one-fourth to one-half percent of gross sales. (R.T. Vol. 15:1534.) Apex dealt with numerous suppliers. For example, in 1979, Apex dealt with approximately 100 suppliers, one of which was Alacal. (R.T. Vol. 15:1747.)

(In the interest of brevity, petitioner will summarize the prosecutor's evidence concerning only the first of the three schemes, i.e., Alacal, as it pertains to petitioner.)

FBI agent William Ryan testified that he examined records of 38 sales from "victims" to Alacal.[1] Ryan was able to trace the disposition of the meat in 31 of those transactions. In 30 of them, Alacal sold its product at a lower price than it had bought it. Twenty-eight of the transactions involved resales to Apex of all or part of Alacal's purchase. (R.T. Vol. 16:1929-15, 1930-15.) Ryan acknowledged that Exhibit 64, which he prepared

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[1]Alacal had purchased at least 50 to 70 carloads of meat. (R.T. Vol. 16:2135.)

as a summary of his analysis, did not reflect any credits taken by Apex for product that was not as good as represented or for credits taken by companies to which Apex sold. The exhibit also did not reflect freight charges paid by Apex, brokerage bills paid by Apex, or storage bills paid by Apex. (R.T. Vol. 16:1948-1950.)

Plumeri testified he never gave Apex or Magidow as a credit reference on behalf of Alacal. (R.T. Vol. 16:2150-2151.) Petitioner's office manager testified he had instructed her not to give any credit references for Alacal since he could not represent he had ever been paid any money by Alacal. (R.T. Vol. 15:1733.) Despite the latter evidence, two other government witnesses, who were each meat traders, testified petitioner gave them credit references about Alacal. Jack Wylie testified he received such a reference on August 13, 1979 when petitioner stated that Alacal had paid him satisfactorily, although slowly, and that he had been selling to Alacal for several months. (R.T. Vol. 9:700, 702.) Ken Bell testified to an August 15, 1979 telephone conversation in which petitioner gave a credit reference for Alacal. (R.T. Vol. 9:774-775.)

On October 16, 1979, Alacal filed for bankruptcy. (Ex. 2.) On October 15, 1979, Apex had picked up from cold storage several loads of meat it had recently purchased from Alacal. (R.T. Vol. 11:1289-1298.) On October 17, immediately after the bankruptcy filing, Apex returned all of those loads to the trustee in bankruptcy. (R.T. Vol. 14:1668-1671.)

C. Evidence And Findings Concerning Witness Coercion By The Prosecutor.

The government's trial team consisted of two Assistant United States Attorneys examining and cross-examining witnesses. One member of that trial team engaged in

serious transgressions commencing with abuse of the grand jury process, suppression of evidence favorable to the defense, and culminating in the inappropriate conversation with a material defense witness' counsel. The timing and content of this untoward conversation had the chilling effect of dissuading witness Ross Berton from testifying for the defense. The solutions implemented by the trial court to cure the ensuing prejudice and punish the government, unfortunately, further compromised the position of the defense.

Codefendant Ross Berton pled guilty to Count 41 of the indictment and was awaiting sentencing in this case while petitioner and others proceeded to trial. (R.T. Vol. 28:4413.) Although at an earlier date the government relayed to Ross Berton's counsel, Michael Bourbeau, that it might wish to interview Mr. Berton, it never did so. (R.T. Vol. 28:4436-4437.) On the day prior to the date Mr. Berton was to testify for the defense, attorney Bourbeau received a telephone call from the trial prosecutor. (R.T. Vol. 28:4421.) The trial prosecutor stated she had learned from defense counsel that Ross Berton would testify for the defense; that she (trial prosecutor) believed it was not in Berton's "best interests" to testify as he still had pending cases including state fraudulent check charges; and that he had Fifth Amendment "problems" if he testified. The prosecutor further threatened that since Berton's sentencing had not transpired, and because of the "cases not being dismissed," Berton could "be hurt" at his sentencing if he testified. (R.T. Vol. 28:4422-4424.)

Attorney Bourbeau was "extremely concerned" when the prosecutor stated it was "not in Berton's best interest" to testify and concluded that his client would be hurt at the time of his sentencing, or that other state cases would be filed against him. (R.T. Vol. 28:4425.) Mr.

Bourbeau believed if Berton testified he would do so truthfully, but the tenor of the trial prosecutor's conversation was that if Berton "testifies for the defense, then this was what would hurt him." (R.T. Vol. 28:4433-4434.) Based upon this conversation with the trial prosecutor, he advised his client not to testify and to invoke his rights under the Fifth Amendment. (R.T. Vol. 28:4434.)

Based upon the *in camera* offer of proof as to Ross Berton's testimony, the district court found Berton's testimony to be "material," "relevant" and "favorable to the defense." (R.T. Vol. 28:5083, lines 6-8.) The court described the prosecutor's conduct in the harshest terms:

> "The conversation between Mr. Bourbeau and Ms. Stock relative to Mr. Berton testifying, the court previously indicated that I felt it was *misconduct*, that it was *certainly improper*, and that it was not necessary for Ms. Stock to have phoned Mr. Bourbeau and had the conversation with him concerning his client testifying. . . . she should not have indicated that it wasn't in his client's best interest to testify and made reference to the pending state counts. . . .
>
> "The court listened to an offer of proof as to what Mr. Berton's testimony would be, if he had been called by the defense. Based upon the offer of proof, the court would find that *the evidence was relevant*, that it was *material, and* that *it would have been favorable to the defense.*" (R.T. Vol. 28:5082, line 16 - 5083, line 8; emphasis added.))

However, the court determined it would let the jurors draw their own conclusions about what transpired

between attorney Bourbeau and the prosecutor, and whether petitioner's case should be viewed as weaker than it truly was. (R.T. Vol. 28:4487-4488.)

At the close of the case, the court gave the following instruction over defense objection:

> "Testimony has been adduced in this case, which *if believed by you*, shows that the government attempted to persuade a witness to not testify. *If you believe* that the government attempted to persuade any witness to not testify in this case, you may consider this evidence as a circumstance tending to show the government's consciousness of the weakness of its case. . . ." (R.T. Vol. 33A:22, lines 1-8; emphasis added.)

LEGAL DISCUSSION OF REASONS FOR CERTIORARI

I

THE COURT OF APPEALS' BASIS FOR REFUSING TO CONSIDER THE WITNESS-COERCION ISSUE, I.E., THAT THE DEFENSE FAILED TO MAKE A SUFFICIENT FORMAL SHOWING OF THE WITNESS' UNAVAILABILITY, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND IS ERRONEOUS.

As noted above, the district court specifically found the lead prosecutor committed misconduct by improperly threatening witness Berton when she became aware Berton would be called as a defense witness. The court also found Berton refused to testify as a result of those threats. He stated under oath he would claim his privilege against self-incrimination as to any questions put to him. [R.T. Vol. 28:4411-4412, 4484-4485.] The court then conducted an *in camera* hearing to receive an offer of proof concerning Berton's testimony.[2] The district court later concluded that Berton's testimony would have been relevant and favorable to the defense.

On appeal, the Court of Appeals found no basis for reversing, as follows:

> "The defendants also argue that the prosecutor's actions deprived them of Berton as a witness in violation of their sixth amendment rights. We disagree.
>
> "Although Mr. Bourbeau and Berton stated that Berton would avail himself of his fifth amendment rights, the record does not establish

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[2]The sealed transcript of the *in camera* hearing is part of the record on this appeal.

> if and to what extent Berton was truly 'unavailable.' *Berton was not placed on the stand so that he would be required to assert the privilege as to individual, specific questions.* Without any indication that Berton would not have testified as to the matters relevant to the defense and absent any opportunity for the district court to rule on the question of whether Berton's assertions of privilege were proper, *we cannot agree that Berton was 'unavailable' for the purposes of this criminal proceeding.* Consequently, we cannot conclude that the prosecutor deprived the defense of a material witness in violation of the defendants' sixth amendment rights." (App. A, p. A9; emphasis added.)

The opinion fails to note that, although Berton was not asked "individual, specific questions," he did testify specifically that he would claim the privilege as to any and all questions put to him. (R.T. Vol. 28:4411-4412.)[3]

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[3]Berton's testimony in this regard was as follows:

> "BY MR. KIRSCHNER:
>
> "Q. Mr. Berton, I intend to ask you a series of questions relating to your activities in D.C.I., your relationship with Barry Benjamin, your relationship with Alan Levy, your relationship with Arnie Magidow. I have been advised by your attorney that you will take the Fifth Amendment with respect to any and all questions that I ask of you. Is that correct?
>
> "A. That's correct.
>
> "MR. KIRSCHNER: Your Honor, with that, I would not proceed to ask any more questions, my understanding being that this witness would take the Fifth Amendment with respect to every question that I asked him concerning these topics.

Neither the court nor the prosecution objected to the manner in which Berton claimed the privilege. Indeed it was obvious that had Berton been asked a lengthy series of individual questions, the already prolonged trial would have been prolonged even further.

Later, after discussion among the court, defense counsel and the prosecution, the defense presented an *in camera* offer of proof to the court concerning the content of Berton's anticipated testimony. (R.T. Vol. 28:4471-4479.) The offer of proof was made at the specific suggestion of the court, in lieu of having Berton take the stand and testify. (R.T. Vol. 28:4472.) The prosecution did not object to the procedure involving an offer of proof rather than specific, individual questions. Instead, the prosecution's only concern was whether the offer of proof was to be made *in camera* or in the presence of the prosecuting attorneys. (R.T. Vol. 28:4473-4475.)

"THE COURT: Counsel doesn't wish to ask the questions and have the witness take the Fifth. You are satisfied with his response that any question that you ask him on the subject he would take the Fifth on advice of counsel.

"MR. KIRSCHNER: Well, I am. But perhaps I could ask one or two questions.

"BY MR. KIRSCHNER:

"Q. Are you acquainted with and do you know a man by the name of Barry Benjamin?

"A. On advice of my counsel under my rights under the Constitution I decline to answer.

"Q. And would that be your answer with respect to every other question that I asked you concerning the topics that I just mentioned?

"A. Yes, it will." (R.T. Vol. 28:4411, line 12 - 4412, line 14.)

Based on the above facts clearly shown by the record, it appears the Court of Appeals erred in finding Berton was not shown to be "unavailable." Therefore, that court also erred in not reaching the serious issues relating to the witness' coercion.

The court's ruling on "unavailability" also conflicts with decisions of other circuits which, in turn, are based on a previous Ninth Circuit decision! The previous Ninth Circuit decision is *United States v. Oropeza*, 564 F.2d 316, cert.den. 434 U.S. 1080 (9th Cir. 1977). There, the Ninth Circuit ruled a witness who had claimed the privilege against self-incrimination was "unavailable" under circumstances which merely permitted an *assumption* that the witness would assert his privilege if called. The opinion described the circumstances as follows:

> ". . . . The court intimated that Heinze was not 'unavailable' as required by [Rule 804, Fed.Rules App.Proc.]. There were indications that, if called, Heinze would assert his privilege against self-incrimination. However, *Heinze never expressly asserted the privilege.* Because the rule requires a finding of unavailability, an express claim of privilege and a ruling thereon should be made. See 4 *Weinstein's Evidence*, par. 804(a)[01](1976). For purposes of this opinion, however, we assume that Heinze was unavailable within the meaning of the rule." (564 F.2d at 325, fn. 8; emphasis added.)

Oropeza is the only Ninth Circuit case which discusses the "unavailability" issue. *Oropeza* has been cited with approval in other circuits. For example, in *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978), the Fifth

Circuit upheld a finding of a witness' "unavailability" where the witness did not even take the stand to assert the privilege against self-incrimination:

> "Weeks' testimony was clearly unavailable under Rule 804(a)(1), which defines unavailability to include declarants not testifying because of privilege. Weeks did not take the stand, obviously relying on the privilege against self-incrimination. . . . Rule 804(a)(1) requires an express assertion of privilege and a ruling by the court that the privilege constitutes unavailability [citation] but *here the existence of the privilege and Weeks' right to assert it and Weeks' unavailability as a witness are patent. . . . It would be mere formalism to abjure the merits of Thomas' claim in these circumstances.* See *U.S. v. Oropeza*, 564 F.2d 316, 325, n. 8 (C.A.9, 1977)." (Emphasis added.)

Thomas was followed by the same circuit in *United States v. Young Brothers, Inc.*, 728 F.2d 682, cert. den. 105 S.Ct. 246 (5th Cir. 1984). There, witnesses were found "unavailable" where "each indicated that if called to testify he would invoke his privilege against self-incrimination." (728 F.2d at 690.) Relying on *Thomas* and *Oropeza*, the Fifth Circuit found the witnesses were in fact unavailable, even though the procedure by which they asserted the privilege was not as formal as those followed in the present case:

> "Thus, although Rule 804(a)(1) literally requires the court to rule upon the validity of the witness' assertion of the privilege, our ruling in *Thomas* indicates that such a requirement need not be met when its fulfillment would be a mere 'formalism.' It is clear from the record

> that the district court assumed a proper claim of the privilege had been made . . . . *It was clear to all participants that each claim would have been made.* . . ." (728 F.2d at 691; emphasis added.)

Rule 804(a)(1) does not even require the formalism suggested by the Ninth Circuit's opinion in the present case. That rule merely states:

> "(a) Definition of unavailability.—'Unavailability as a witness' includes situations in which the declarant—
>
> > "(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement . . . ."

Here, the trial court obviously "exempted" Berton from testifying after he *specifically stated under oath* he would claim the privilege as to any questions asked him. Under Rule 804(a)(1), and also under *Oropeza*, *Thomas*, and *Young Brothers*, the finding of Berton's unavailability as a witness must be upheld. The Ninth Circuit's conclusion to the contrary is incorrect, as well as being inconsistent with the latter authorities.

The need for certiorari on this issue is heightened by the cause of the witness' unavailability, i.e., improper coercion by the prosecutor, and by the result, i.e., denial of petitioner's opportunity to present evidence found to be relevant, material and favorable to his defense.

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *Faretta v. California*, 422 U.S. 806, 818 (1975); *Webb v. Texas*, 409 U.S. 95 (1972).)

> ". . . this basic right is violated . . . where . . . prosecutorial misconduct . . . leads to the same result: interference with the right to present the testimony of witnesses." (*Berg v. Morris*, 483 F.Supp. 179, 182 (E.D. Cal. 1980), citing *United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976).)

For the latter reasons, and particularly because the Court of Appeals' opinion here conflicts with rules established in other circuits and, indeed, with prior Ninth Circuit opinions, it is appropriate that this Honorable Court grant certiorari and determine the appropriate standards for establishing "unavailability" of a witness who seeks to invoke his right against self-incrimination.

II

WHERE A DISTRICT COURT FINDS A PROSECUTOR HAS IMPROPERLY DISSUADED A WITNESS FROM TESTIFYING TO FACTS RELEVANT AND FAVORABLE TO THE DEFENSE, THE COURT MAY NOT THEN PERMIT THE JURY TO RECONSIDER WHETHER THE PROSECUTOR ACTED IMPROPERLY AT ALL.

A second issue worthy of review by writ of certiorari arises from the district court's failure - after finding witness coercion had occurred - to instruct the jury to assume that fact. Since the issue was plainly one of law, the court erred in permitting the jury to reconsider it and, thus, to assume the defense case was weaker than it truly was.[4]

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[4]Petitioner's appeal presents other significant issues, including that of other possible remedies for a prosecutor's improper witness

Despite its finding that the prosecutor had in fact committed misconduct in dissuading Berton from testifying, the trial court left the jury with the option to conclude otherwise. The court instructed the jury as follows:

> "Testimony has been adduced in this case, which *if believed by you*, shows that the government attempted to persuade a witness not to testify. *If you believe* that the government attempted to persuade any witness not to testify in this case, you may consider this evidence as a circumstance tending to show the government's consciousness of the weakness of its case. It is for you to determine the weight and significance which you accord such evidence." (R.T. Vol. 33A:33-22, lines 1-8; emphasis added.][5]

The court's instruction must be deemed erroneous for several reasons, including the following:

1. The question whether prosecutorial misconduct occurred was indisputably a legal one, not a factual determination for a jury. By leaving the jury with the option of finding no misconduct, the court effectively

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coercion. However, those issues are already the subject of substantial law among the Ninth and other circuits. Those issues should have been considered by the Ninth Circuit's opinion here - and they will be in the future, if this Honorable Court agrees on certiorari that the "unavailability" rationale was not a sufficient basis for refusing to reach them.

[5]Petitioner requested instructions that required the jury to assume misconduct had occurred. Those instructions would have informed the jury that the prosecutor *had* acted improperly and that the jury *could* consider that conduct "as a circumstance tending to show the government's consciousness of the weakness of its case." (See E.R. 51-53, Special Instructions Nos. 1-3.)

permitted the prosecution to absolve itself of flagrant derelictions and to accomplish successfully the improper goal of denying petitioner his Sixth Amendment right to obtain witnesses in his favor. Although there do not appear to be any authorities directly on point, it seems obvious that a trial court may not leave the question of prosecutorial misconduct to a jury. For example, in *U.S. v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983), the Ninth Circuit itself remanded a matter for a hearing on the specific question whether prosecutorial misconduct had occurred. That Court directed the trial court, not a jury, to make that determination. Nothing in the opinion or in any other misconduct case of which petitioner is aware suggests that a second, independent determination on the question may be made by a jury.

2. Assuming for the sake of argument only that the jury might properly have been allowed to determine whether misconduct occurred, the trial court's instruction was deficient because it gave the jury *no guidance* whatsoever on how it was to make that determination. The court merely informed the jury that if it believed the testimony concerning the attempt to persuade Berton not to testify, it could consider the evidence as a circumstance tending to show the government's consciousness of the weakness of its case. If the court was properly going to permit the jury to believe or disbelieve such testimony, at minimum it should have informed the jury that the prosecutor did not dispute the essential facts related in the testimony of Berton's attorney. Without such a further instruction, the jury could freely have chosen to disbelieve testimony that was in effect undisputed.

In summary, the trial court's instruction on the misconduct issue was plain error, legally and logically. Because this issue is at once important to many cases

and unresolved by the Courts of Appeal, certiorari is appropriate in this matter for a second, additional reason.

CONCLUSION

As noted at the outset, because both the district court and the Ninth Circuit failed to address or decide highly signifcant questions of law which would have a bearing on numerous other cases, and because the Court of Appeals' interpretation of "unavailability" of a witness who asserts his Fifth Amendment right against self-incrimination conflicts with decisions of other circuits and in fact of the Ninth Circuit itself, petitioner respectfully requests this Petition for Writ of Certiorari be granted and that this Honorable Court determine the questions presented.

Respectfully submitted,

RICHARD G. SHERMAN

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Attorney for Petitioner
AARON MAGIDOW

APPENDIX

FILED

FEB - 4 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD JOSEPH HACKEL, Defendant-Appellant.	)No. 83-5209)DC No. CR 82-822)CBM
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALAN LEVY, Defendant-Appellant.	)No. 83-5215)DC. No. CR 82-822)CBM
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)No. 83-5229)DC No. CR 82-822)CBM

APPENDIX A

v.

AARON MAGIDOW,) **MEMORANDUM***
)
Defendant-Appellant.)

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
Argued and Submitted November 8, 1985
Los Angeles, California

BEFORE: WALLACE, HUG, and HALL, Circuit Judges.

Harold J. Hackel, Alan Levy, and Aaron Magidow appeal their convictions on 78 counts of federal mail and wire fraud. Appellants assert, *inter alia,* that the prosecutor deprived them of a material witness in violation of their sixth amendment rights, that the district judge erred in not disqualifying one of the prosecutors during the trial, and that the trial judge joined improperly certain counts and defendants. Magidow also challenges the sufficiency of the evidence against him. All appeals were timely, 28 U.S.C. § 1291. We affirm.

I

The indictment in this case charged appellants with mail and wire fraud in violation of 18 U.S.C. §§ 2(b), 1341, and 1343. The counts covered a series of so-called "bust out" bankruptcy schemes involving insolvent corporations in the meat-packing industry over a period of approximately two and three-quarter years.

These schemes were executed using three corporate entities: Alaska California Meat Company ("ALACAL"),

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Cincinnati By-Products Co. ("CBP"), and Distribution Consolidators, Inc. ("DCI"). All three schemes employed roughly the same pattern of fraudulent dealings. All three schemes involved companies in the same industry that eventually became insolvent. All three involved the use of fictitious names, false credit references, and the sale of meat products below cost.

II

Magidow challenges the sufficiency of evidence against him. The record reveals ample evidence to sustain his conviction.

When reviewing the trial record to determine whether sufficient evidence exists to sustain Magidow's conviction, we must determine whether "any rational trier of fact could [find] the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The evidence must be viewed in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), and the government is entitled to all reasonable inferences that might be drawn therefrom. *United States v. Price,* 623 F.2d 587, 591 (9th Cir. 1980).

Magidow's strongest arguments concerning the sufficiency of evidence are twofold. First, much of the government's case against him, especially the portion pertaining to the ALACAL scheme, is based on his favorable credit references to suppliers. Magidow was not convicted on these counts.[1] Second, Magidow contends that when reviewing the ALACAL counts, his involvement in the CBP and DCI schemes cannot be

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[1] The jury failed to return a verdict on the five counts dealing with Magidow's ALACAL credit references.

used to bolster the government's case since those events occurred later in time.

While Magidow was not convicted on the counts dealing with false credit references for ALACAL, the jury's failure to return a verdict on these counts is not necessarily inconsistent with Magidow's conviction on other counts. It is impossible to know what occurred during the jury's deliberations; the jury may have harbored some doubt about the tone or substance of these telephone conversations that counseled hesitation. The evidence describing Magidow's purchases of meat from ALACAL through Apex was clearer because it was memorialized in a paper record. The jury rationally could have found beyond a reasonable doubt that Magidow's purchases facilitated the other acts of mail and wire fraud charged in the indictment, 18 U.S.C. § 2(b), and the record amply supports such a verdict.

Although Magidow was not convicted on Counts One through Six, he was not acquitted either.[2] In the absence of an acquittal, the government is entitled to use the evidence and reasonable inferences drawn therefrom to support the other counts under which Magidow was convicted.

Magidow urges that CBP and DCI evidence cannot be used to support ALACAL convictions. Fed. R. Evid. 404(b) provides that evidence of other crimes, wrongs or acts "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, [or] knowledge . . . ." The admissibility of this type of evidence is not limited to *prior* acts. *United States v. Young,* 573 F.2d 1137, 1140 (9th Cir. 1978); *United States v. Cobb,* 397 F.2d 416, 417-18 (7th Cir.), *cert.*

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[2] The jury failed to reach an agreement on these counts and the government later dismissed them on its own motion.

denied, 393 U.S. 924 (1968). Because subsequent acts are admissible to show intent and common plan, the CBP and DCI evidence can be used to show Magidow's intent in the ALACAL scheme.[3]

III

The defendants argue that the three schemes were improperly joined under Federal Rule of Criminal Procedure 8(b)[4] and, in the alternative, that the joinder was prejudicial under Federal Rule of Criminal Procedure 14.[5] We disagree.

The question of whether counts were properly joined involves an interpretation of Rule 8 and is, therefore, subject to review de novo. *See United States v. Friedman,* 445 F.2d 1076 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971).

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[3] Magidow argues that much of the evidence presented by the government demonstrates only that Magidow is a shrewd businessman capable of driving a hard bargain. This argument lacks force. While some of the evidence may be as consistent with this view of Magidow's actions as it is with the theory that he was engaged in a fraudulent scheme, on review the government is entitled to the inference. *Price,* 623 F.2d at 591.

[4] Fed. R. Crim. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[5] Fed. R. Crim. P. 14 states in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

> [J]oinder is the rule rather than the exception and . . . the burden is on the defendant in his appeal following denial of the motion to sever to show that joinder was so manifestly prejudicial that it outweighed the dominant concern with judicial economy and compelled exercise of the court's discretion to sever.

United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980).

"[W]hen the transactions are basically the same, and when one person serves as a common link between the transactions, joinder under Rule 8(b) is proper." *United States v. Burreson*, 643 F.2d 1344, 1347 (9th Cir.), *cert. denied*, 454 U.S. 847 (1981). The evidence in this case shows an overwhelming similarity in method among the three schemes charged. All three schemes involved Levy and Magidow in some capacity. All three schemes involved the meat product industry, the use of fictitious names, the use of false credit references, and the sale of product below cost.

The time intervals between the schemes do not compel a different result. Only three months separated the ALACAL and CBP schemes, and only two and three-quarter years separated all three schemes. Given the time necessary to set up new sales and distribution arrangements, the facts portray an almost continuous scheme to defraud. The fact that the schemes occurred in different locations is not surprising given the nature of the scheme and is not sufficient to require severence by the trial court.

The trial court's decision on Rule 14 severence will be overturned only for abuse of discretion. *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977). Our review of the record

reveals that the trial court did not abuse its discretion in denying defendants' motions for Rule 14 severence.

IV

During a recess in the trial, the lead prosecutor, Nancy Stock, called the attorney for co-defendant Ross Berton, Mike Bourbeau, on the telephone.[6] The subject of the telephone conversation concerned Berton's availability for an interview by the prosecutors, Berton's intention to testify for the defense, and the repercussions Berton's testimony might have on his sentencing in federal court and on suspended state court proceedings.

Concurrent with Berton's agreement in the federal case, he had obtained from the local prosecutors a declination of prosecution on outstanding insufficient funds checks which had been drafted on DCI's defunct bank accounts. This declination was conditioned on Berton's receiving a custody sentence in the federal action and paying restitution.

The prosecutor told Bourbeau she expected Berton to tell the truth and not jockey his testimony for the defense, and that if Berton testified untruthfully it would affect his sentencing in the federal case.

The prosecutor also warned Bourbeau that Berton's testimony could incriminate him in the suspended state court action dealing with DCI checks. Bourbeau stated that as a result of the conversation with the prosecutor he advised Berton to assert his fifth amendment rights. At trial, Berton responded affirmatively when asked generally by defense counsel whether he would be asserting his fifth amendment right if called to the stand.

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[6] Berton previously had pleaded guilty to Count 41 of the indictment. He had been charged only with Counts 40-44 dealing with the DCI scheme. The government moved to dismiss the remaining counts after Berton's plea.

A

The district court's denial of defendants' motion to disqualify Stock so that she could be called to testify is reviewed for abuse of discretion. *See United States v. Prantil,* 764 F.2d 548, 552 (9th Cir. 1985).

The advocate-witness rule prohibits a prosecutor from continuing to conduct her case if she is called as a witness. As a result, we disfavor allowing the prosecutor to testify at trial. *United States v. West,* 680 F.2d 652, 654 (9th Cir. 1982). "[A] defendant has an obligation to exhaust other available sources of evidence before a court should sustain a defendant's effort to call a participating prosecutor as a witness." *Prantil,* 764 F.2d at 551. While attention must be paid to the defendant's sixth amendment right to confront witnesses, *United States v. Nixon,* 418 U.S. 683, 709 (1974), the prosecutor will be forced to testify only if the defendant demonstrates "compelling need." *Prantil,* 764 F.2d at 554 (citing *United States v. Tamura,* 694 F.2d 591, 601 (9th Cir. 1982)).

The prosecutor's testimony in this case was not necessary to the defense. First, Stock's testimony would only be relevant to the issue of whether the prosecutor thought she had a weak case against the defendants. Whether the prosecutor thought she had a weak case or not is hardly a fact that the defense had a "compelling need" to demonstrate. Second, the prosecutor's testimony would have been cumulative. Bourbeau testified as to the content of the telephone conversation. Stock was also prohibited from asking leading questions during her examination of Bourbeau so that she could not "testify" through her cross-examination.

Stock's actions were certainly ill-advised. In this case, however, the trial court's denial of defendants' motions was not an abuse of discretion.

B

The defendants also argue that the prosecutor's actions deprived them of Berton as a witness in violation of their sixth amendment rights. We disagree.

Although Bourbeau and Berton stated that Berton would avail himself of his fifth amendment rights, the record does not establish if and to what extent Berton was truly "unavailable." Berton was not placed on the stand so that he would be required to assert the privilege as to individual, specific questions. Without any indication that Berton would not have testified as to the matters relevant to the defense and absent any opportunity for the district court to rule on the question of whether Berton's assertions of privilege were proper, we cannot agree that Berton was "unavailable" for the purposes of this criminal proceeding. Consequently, we cannot conclude that the prosecutor deprived the defense of a material witness in violation of the defendants' sixth amendment rights.

V

Hackel contends that the statements by the prosecutor during opening argument referring to Western World Marketing's bankruptcy petition, a document not offered into evidence, constituted reversible error. Prosecutorial misconduct does not justify reversal unless it appears more probable than not that the misconduct affected the jury's verdict. *United States v. Flake,* 746 F.2d 535, 541 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1220 (1985).

The failure to offer the petition into evidence was harmless error. Although the petition was not admitted, a significant amount of evidence describing the financial condition of Western World was adduced at trial.

VI

The defendants raise a number of other issues regarding the conduct of their trial which we find to be without merit.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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APR 25 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 83-5229
	)	DC No. 82-822
Plaintiff-Appellee,	)	CBM
v.	)	
	)	ORDER
AARON MAGIDOW,	)	
Defendant-Appellant.	)	

Before: WALLACE, HUG, and HALL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge requested a vote on it. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 24, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

The Honorable Consuelo
B. Marshall
312 North Spring Street
Los Angeles, California 90012

Office of the U.S. Attorney
Nancy Stock,
Assistant U.S. Attorney
312 N. Spring Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 24, 1986, at Los Angeles, California.

Sharon Lynn Stewart
(Original signed)